

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Reserved on : 17th October, 2012**
Pronounced on : 20th November, 2012

+ CRL.A. 41/2011

RAJU Appellant
Through : Ms.Rakhi Dubey, Adv.

versus

STATE Respondent
Through: Ms.Rajdipa Behura, APP for
State.

AND

+ CRL.A. 319/2011

NANEHEY @ VIJAY Appellant
Through : Mr. S.K.Sethi, Adv.

versus

STATE Respondent
Through: Ms.Rajdipa Behura, APP for
State.

AND

+ CRL.A. 728/2011

RAM NIWAS Appellant
Through : Mr. Anish Dhingra, Adv.

versus

STATE Respondent
Through: Ms.Rajdipa Behura, APP for
State.

**CORAM:
HON'BLE MS. JUSTICE PRATIBHA RANI**

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PRATIBHA RANI, J.

1. These three appeals bearing Crl.A. Nos.41/2011, 319/2011 and 728/2011 have been preferred by the appellants namely Raju, Nanehey and Ram Niwas respectively challenging the judgment dated 18.05.2009 vide which they were convicted for the offence punishable under Section 366 & 376(2)(g) IPC and also the order dated 25.05.2009 sentencing them under Section 366 IPC to undergo RI for four years with fine of Rs.1,000/- and in default, to undergo SI for two months and also under Section 376(2)(g) IPC to under RI for ten years with fine of Rs.2,000/- each and in default, to undergo SI for four months.
2. The appellants namely Raju, Nanehey and Ram Niwas were tried and convicted by learned ASJ in Sessions Case No.8/2008 for committing the offence punishable under Sections 366 & 376(2)(g) IPC. Feeling aggrieved, all the appellants have preferred these appeals.
3. In brief, the case of the prosecution is that all the three appellants are from the native place of the complainant Shyam Lal, brother of the prosecutrix 'R' (name of the prosecutrix withheld to conceal her identity). On 22.02.2004 the complainant reported at PS Badarpur that he alongwith his wife, children and younger sister 'R' aged about 15 years was residing at Badarpur. On 19.02.2004, he left his house in the morning to sell '*Chole-Bhature*'. When he returned in the evening, his wife informed that the three boys namely Raju, Nanehey and Ram Niwas came from the Village and had taken away 'R' as his parents were

seriously ill. He contacted his father on phone on 20/21.02.2004 and then came to know that they were fine and have not sent anyone to bring 'R' and she had not reached her home in the village. He suspected the three appellants behind the kidnapping of his sister and prayed that efforts be made to find out her sister.

4. Case FIR No.126/2004 under Section 363 IPC was registered against the appellants. The prosecutrix was brought to the police station by her father. After recording her statement, search was made for the offenders. While appellants Raju and Nanehey were arrested on 25.02.2004, appellant Ram Niwas was declared Proclaimed Offender. Statement of prosecutrix under Section 164 CrPC was got recorded on 28.02.2004. Prosecutrix as well as appellants Raju and Nanehey were got medically examined. After completion of investigation, chargesheet was filed against them. Subsequently, on the arrest of appellant Ram Niwas, supplementary chargesheet was filed against him.

5. Learned ASJ considered the testimony of prosecutrix to be trustworthy and inspiring confidence. Believing her testimony that all the three appellants had taken her away from the house of her brother on the pretext of illness of her parents and on the way to the village in a field, they committed rape on her by turn, convicted all the three appellants for committing gang rape and sentenced in the manner aforesaid.

6. On behalf of appellants Raju and Nanehey, conviction has been challenged on the ground that the entire prosecution story is improbable and testimony of prosecutrix is not worthy of credence. Thus, the conviction of the appellant for gang rape is liable to be quashed. It has

been submitted that there is an inordinate delay in reporting the matter to the police as date of occurrence is 19.02.2004 and the police has been informed on 22.02.2004. It has been further submitted that the prosecutrix, who was major, had love affair and physical relationship with appellant Ram Niwas. She had consensual sexual intercourse with appellant Ram Niwas which was seen by her relative. However, Ram Niwas absconded and the other two appellants namely Raju and Nanehey being friends of Ram Niwas were apprehended by the police from their village to put pressure on Ram Niwas to surrender, who absconded, and they have been falsely implicated in this case. It has been further submitted that Raju and Nanehey had neither kidnapped the prosecutrix from the house of her brother nor committed any rape on her and they have suffered just because of their friendship with the appellant Ram Niwas who had even admitted in his statement under Section 313 CrPC that he had an affair and was in physical relationship with the prosecutrix with her consent.

7. Learned counsel for appellants Raju and Nanehey have referred to the contradictions in the statement of PW-1 Bhagirath - father of the prosecutrix, PW-5 Shyam Lal - brother of the prosecutrix who is also the complainant and also that of the prosecutrix i.e. PW-4 'R', to point out that their version is improbable especially in view of the fact that PW-5 Shyam Lal has admitted that at the time when he lodged the FIR, the prosecutrix was with him. Learned counsels for the appellants Raju and Nanehey also pointed out that even as per PW-1 Bhagirath and PW-5 Shyam Lal, the appellants were arrested from the village which is not the case of the prosecution. Even the medical evidence proved that there

was no external/internal injury and hymen admitted two fingers which further indicate that prosecutrix was habitual to intercourse. On the age of prosecutrix, who is claimed to be minor by the prosecution, reference has been made to the age disclosed by the prosecutrix before the Court wherein she has specifically stated that she was 19 years of age at that time. Her father has not given any date of birth, rather stated that he did not know the date of birth of his daughter 'R'. Prosecution did not bring any evidence that the age of prosecutrix was 15 years whereas she herself claimed to be 20 years old, when examined in the Court as PW-4. Both these appellants namely Raju and Nanehey have been falsely roped in after bringing them from the village on the pretext of making inquiries, hence they may be acquitted.

8. On behalf of appellant Ram Niwas, it has been contended that incident of alleged gang rape had taken place in Uttar Pradesh. As per prosecution, the prosecutrix was taken from her brother's house on 19.02.2004 and raped on 20.02.2004 and thereafter she went to her parent's house where she narrated the incident. Her father informed the local police but they were advised to report the matter in Delhi (from where she was kidnapped) and thereafter FIR was registered at the instance of PW-5 Shyam Lal, brother of the prosecutrix and not at the instance of prosecutrix though even in her statement in the Court, she claimed to be present in the Police Station at the time of registration of FIR. It has been further urged that though the prosecutrix was present to narrate the incident, FIR was registered on the statement of her brother only under Section 363/34 IPC and not for rape. Not only that, during examination PW-1 Bhagirath – father of the prosecutrix had given a

different version as to who met the prosecution in the field and how she reached home. The mother of the prosecutrix to whom she narrated the incident, also remained unexamined. Learned counsel for the appellant also referred to the testimony of PW-1 Bhagirath wherein on the one hand, he had stated that many persons brought the prosecutrix home and on the other hand, in his cross examination, stated that he did not inform anyone in the village about this incident. Even the person running the telephone booth in the village where PW-1 Bhagirath received the call from his son PW-5 Shyam Lal was not cited as a witness. The medical evidence shows that the prosecutrix is habitual to sexual intercourse. She had no internal/external injury. The prosecutrix had stated before the Court that she was raped by each accused twice, thus, she was raped six times and in that situation, it was highly improbable that she would not suffer any internal or external injury. Her conduct of not raising alarm or failure to inform Bhagwan Dass about the incident also makes her testimony doubtful.

9. Learned counsel for appellant Ram Niwas has further submitted that appellant was having love affair with the prosecutrix and when the prosecutrix was seen in compromising position with the appellant by Bhagwan Dass and other villagers, just to save honour of the family, the appellant had been falsely implicated in this case.

10. Legality of the conviction has also been challenged on the ground that even the site plan of the place of incident, which is in U.P., has not been prepared by the IO and the statement made by the prosecutrix before learned MM was tutored as at that time she was with her father and brother. The appellant has prayed for his acquittal in view of the

material contradiction in the testimony of PW-1 Bhagirath, PW-4 – the prosecutrix, PW-5 Shyam Lal, and PW-10 Rajbala contending that the testimony of prosecutrix which remained unsupported and uncorroborated and her conduct immediately after the occurrence, makes the entire prosecution case doubtful.

11. On behalf of State, Ms.Rajdipa Behura, APP has submitted that the prosecutrix was minor at the time of incident so her consent becomes immaterial. It has been further submitted that there is nothing on record to suggest that prosecutrix was 20 years of age as claimed by her. Even father of the prosecutrix was not having any documentary evidence regarding date of birth of the prosecutrix to prove her to be of 20 years of age and at the time of lodging the missing report, her brother has given her age as 15 years which remained unrebutted.

12. Learned APP for State has further submitted that the rape was committed in a field and not on hard surface so there was not much possibility of prosecutrix suffering external injuries. It being a case of gang rape, merely because vagina admitted two fingers is not sufficient to give rise to the inference that she was not subjected to forcible sexual intercourse.

13. On the issue of delay in registration of FIR, learned APP has urged that delay in itself is not fatal to the case of prosecution if it is properly explained in a case where honour of a family is at stake. Referring to the statement of PW-5 Shyam Lal, learned APP has urged that the entire delay has been explained by him as to when he came to know about taking away of his sister by the three appellants and efforts made by him to confirm from his father about her arrival there or she being called by

them on account of their illness. It was only when she did not reach home that case of kidnapping was registered against the three named persons and after the recovery of prosecutrix and on the basis of her statement that the appellants were also booked for gang rape. It has been further submitted that the testimony of prosecutrix if it is trustworthy and inspiring confidence, can be made basis for conviction of the appellants without any further corroboration from any other corner as prosecutrix is the victim of the offence and in the absence of any motive to falsely implicate the appellants, learned ASJ has rightly convicted the appellants for committing gang rape. Learned APP for State has relied upon *Vijay @ Chinee vs. State of Madhya Pradesh (2010) 8 SCC 191* in support of her contentions.

14. I have considered the rival contentions and carefully gone through the record.

15. There is no explanation coming forward that when offence of rape was committed in U.P. in the fields near the village of prosecutrix, why the prosecutrix and her father preferred to come to Delhi all the way and not going even once to PS Bissat Ganj to report the matter or to the nearby hospital immediately for necessary treatment who would have informed the police, it being a medico legal case.

16. No doubt, in a case where an unmarried young girl has been subjected to gang rape, delay in lodging the FIR is not of much significance but here the situation is entirely different. The rape was stated to have been committed in the village of the prosecutrix in U.P. on 19/20.02.2004 and she reached home within one hour thereafter, but neither she was taken to the hospital for necessary medical aid for

collection of scientific evidence by the doctor nor the local police was informed about the commission of gang rape by the three appellants.

17. It is worth mentioning here that when the prosecutrix appeared for getting her statement recorded, she mentioned her age to be 20 years and at least at that time a duty was cast upon the learned Trial Court to examine the aspect of age of the prosecutrix especially when the extract of the family register was very much available on record which on the face of it could not be discarded as fabricated till verification report to the contrary was received.

18. The documentary evidence regarding age of the prosecutrix by way of entries in the Family Register was available, which is established from the fact that while filing bail application dated 10.09.2004 before the learned Trial Court, the following pleas were taken by Raju and Nanehey :

- (i) They were brought by Delhi Police from their village on 24.02.2004.
- (ii) Their apprehension by Delhi Police was published in the newspapers Amar Ujala and Dainik Jagran on 25.01.2004.
- (iii) The prosecutrix was major and in that case if consent is proved, the offence of rape would not be made out.
- (iv) The investigation was not conducted regarding her age, whereas the extract of family register duly attested by Pradhan of the village was enclosed with the bail application as Annexure-A showing the age of the prosecutrix in the year 1999-2000 as 16 years. These entries contain age of the parents of the prosecutrix and her other siblings including the youngest one who was 2 years old at the time when these entries were

made for the year 1999-2000. Even in the bail application, prayer was made to get the extract of the family register authenticated/verified from the village which was not got done.

(v) Some of the prominent persons from the village had written letters about taking away of Raju and , Nanehey by Delhi Police from the village on the pretext of making some enquiries and thereafter their false implication in this case.

19. It is pertinent to note here that despite taking all these pleas in the bail application, the same could not be proved by the appellant Nanhe & Raju by leading defence evidence to this effect, may be because of not getting proper legal assistance and they being not financially sound enough to engage a good lawyer to represent them during trial to prove their innocence/defence which fact can be made out from the fact that initially after examination of material witness, the cross was recorded as 'NIL' and subsequently, though the witnesses have been cross-examined, but not effectively.

20. It was the duty of the learned Trial Court to look into all these documents, plea of accused persons regarding their innocence and false implication and direct the investigating agencies to at least verify the extract in the family register if the IO failed to get ossification test of the prosecutrix conducted and collect other evidence regarding her age.

21. It is nowhere the case of the prosecution nor it has been so stated by the prosecutrix or her father that when the prosecutrix reached home within one hour of the occurrence after being repeatedly sexually assaulted by three person, she was having any external or internal injuries.

22. In the case **Lalliram & Anr. vs. State of M.P. vs. State of Madhya Pradesh 2008 (10) SCC 69** it was held that :

*'It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in **Pratap Misra vs. State of Orissa** where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important fact and if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See **Aman Kumar v. State of Haryana**).'*

23. Learned Trial Court failed to take note of the fact that prosecutrix, who was an unmarried grown-up teenager girl claimed to have been raped by three appellants repeatedly in the field, deposed before the Court that she put resistance when she was raped but there was none to hear her cries. As per the MLC, the prosecutrix had not suffered any injury external or internal and vagina admit two fingers. Though absence of injuries is by itself is not sufficient to hold her consenting party but in the given facts when after being raped by three appellants by turn and each of them raping her twice to the extent that she claimed that she became unconscious (*Besudh Ho Gayi Thi*), ordinarily when forcible sexual intercourse is committed on a grown-up girl capable of putting resistance who also put stiff resistance, there would be possibility of injuries on her person as well private part and absence of injury is indicative of the fact that either offence was not committed or she was a consenting party. Had the prosecutrix been gang raped six times i.e. each of the three appellants raping twice by turn, the doctor would have noticed tear, tenderness, swelling in the vagina. The medical evidence

does not support or corroborate the version of the prosecutrix.

24. In a case of rape, the uncorroborated sole testimony of the prosecution is enough to base conviction, provided that it is trust worthy and inspiring confidence but at the same time, the duty of the prosecution to prove its case beyond reasonable doubt equally applies to a rape case. In order to prove gang rape by the appellants on 'R' after kidnapping her from the lawful custody of her brother i.e. PW-5 Shyam Lal, the material prosecution witnesses examined by the prosecution to prove its case are PW-1 Bhagirath, PW-4 – 'R' – the prosecutrix, PW-5 Shyam Lal and PW-10 Rajbala. It is necessary to highlight the salient features of the statement of these witnesses made on the material aspects during the course of investigation as well as thereafter in the course of trial to note the inconsistencies, embellishments and exaggeration.

PW-5 Shyam Lal, Complainant/brother of prosecutrix :

**As per complaint Ex.PW5/A & Statement recorded
under Section 161 CrPC**

- (i) Prosecutrix **left on 19.02.2004** at 10.00 am with three appellants when he was away from home to sell *Chole-Bhature*.
- (ii) In the evening, when he came to know from his wife, talked to his father on **20.02.2004 and 21.02.2004**.
- (iii) On being informed that 'R' has not reached home, **lodged the FIR Ex.PW5/A on 22.02.2004** at 7.30 pm informing kidnapping of his sister and requesting **to search her** and legal action against the offenders.
- (iv) As per the FIR Ex.PW5/A, date of occurrence is from **12.02.2004 to 22.02.2004**.
- (v) His father alongwith his sister came from village on 25.02.2004

and informed about the rape and that all the three appellants had come to Delhi to threaten them. All of them visited the police station.

(vi) Appellant Raju and Nanehey **arrested from Badarpur Bus Terminal.**

Court Statement (Examination-in-chief) recorded on 01.07.2005

(i) His father called on phone on the same day evening i.e. on 19.02.2004 but could not talk. On **20.02.2004 and 21.02.2004** he **had a talk** with his father and his father informed him that **‘R’ had reached home.**

(ii) On **22.02.2004** **his father and sister reached Delhi** and on the **same day Nanehey and Raju arrested from the village** and brought to Delhi.

Court Statement (Examination-in-chief) recorded on 05.07.2006 (after arrest of appellant Ram Niwas as P.O.)

(i) On **21.02.2004**, his **father informed** that **‘R’ has reached home** and on **22.02.2004** he **lodged the report at Delhi** as U.P. police refused to lodge the report.

PW-10 Rajbala – Bhabhi of the prosecutrix, in whose presence prosecutrix was taken by the three appellants.

Statement recorded under Section 161 CrPC on 23.02.2004

(i) On 19.02.2004 her sister-in-law ‘R’ was taken by the three appellants on the pretext that she has been called by her parents who were sick.

- (ii) In the evening when her husband returned, he was informed.
- (iii) Her husband received a telephone call from the village same evening (19.02.2004) informing that his parents were fine and they had not sent anyone to bring 'R'.
- (iv) Her sister-in-law had been kidnapped by the three appellants with some wrong intention and her honour and life was in danger and she should be saved.

Court statement (Examination-in-chief) recorded on 28.02.2006

- (i) Her sister-in-law 'R' was taken by the three appellants on the pretext that she has been called by her parents who were sick.
- (ii) In the evening when her husband returned, he was informed.
- (iii) Her husband received a telephone call from the village same evening (19.02.2004) informing that he was fine and they had not sent anyone to bring 'R'.

PW-1 Bhagirath – father of the prosecutrix

Statement recorded under Section 161 CrPC on 25.02.2004

- (i) He received a telephone call on 20.02.2004 and 21.02.2004 from Delhi that 'R' had been taken away by Nanehey, Raju and Ram Niwas to the village.
- (ii) **He searched Raju, Nanehey and Ram Niwas in the village but could not find hence, visited the police station to lodge the report but he was informed that as his daughter has gone from Delhi, he should go and lodge the report in Delhi.**
- (iii) **On 21.02.2004**, he was searching for his daughter and at that time,

some villagers left his daughter at his house and thereafter he brought his daughter to Delhi.

(iv) He was informed by his daughter that she was kept by the three appellants **in a room where they have done *galat kaam*, changed her clothes and her clothes have been burnt.**

Court statement (Examination-in-chief) recorded on 28.03.2005

(i) He informed his son that he and his wife were fine and they have not asked the three appellants to bring 'R'.

(ii) He searched for the three appellants and his daughter but could not find them.

(iii) On **20.02.2004 at 4.00 pm, he met his daughter near Mint Plant in the field of Wheat.**

(iv) **He took his daughter to PS Bisarati Ganj but was asked to lodge the report at Delhi.**

(v) **He left his village on 21.02.2004 and reached Delhi on 22.02.2004 and lodged the report.**

Court Statement(Examination-in-chief) recorded on 02.09.2006

(i) On 19.02.2004 he was informed by someone that his presence was required in Delhi and being night time, did not attend the call but again said that he was not present at his house at that time.

(ii) On 20.02.2004 he attended the telephone call from his son and on coming to know that the three appellants had taken 'R' on the pretext of illness of his wife, he informed his son that she was alright.

(iii) His son asked him to make search for the accused at their houses

but they were not available at their respective houses.

- (iv) **On 20.02.2004 at about 4.00 pm, 'R' met his nephew Bhagwan Dass near Mint Plant of field of Wheat.**
- (v) **Many people collected there and they brought 'R' to his house.**
- (vi) His daughter told him that she was raped by the three appellants.
- (vii) **On 20.02.2004 in the evening, he went to PS Bissat Ganj to lodge the report but he was advised to lodge the report at Delhi.**
- (viii) **On 21.02.2004 he left the village and reached Delhi same night.**
- (ix) On 22.02.2004 they (PW-1, 4 and 5) lodged the report in the PS.

PW-4 'R' – the prosecutrix

Statement recorded under Section 161 CrPC on 25.05.2004

- (i) She was taken by the three appellants on 19.02.2004 at 10.00 am from the house of her brother on the pretext that her parents were ill and she has been called by them.
- (ii) She accompanied them as they were from her village.
- (iii) **She was taken to the village initially in the bus and then by train upto Bareilly.**
- (iv) By the time, they reached village, it was night time and appellant Nanehey, on the pretext that the way to the village was not in good condition, decided to stay on the way.
- (v) **All of them stayed in an old constructed room in the fields.**
- (vi) **During night time, all the three appellants raped her by turn repeatedly.**
- (vii) **When she became unconscious, all the three appellants left her**

there and ran away.

(viii) **Some villagers took her from there and left her at her house.**

(ix) From her house, she was brought to Delhi.

(x) She had come to know that all the three appellants have also come to Delhi to threaten them.

(xi) **After committing the rape, they changed her clothes and clothes which she was wearing at the time of rape, were taken away by them.**

Statement recorded under Section 164 CrPC on 28.02.2004

(i) She was taken by all the three appellants on the pretext that her parents were sick and **initially she was taken in three wheeler scooter, then by bus and then by train upto Bareilly and then from Bareilly, by another train to village Chaubari.**

(ii) They crossed *Ganga Nehar* on foot and **in the fields at Village Akha and her village Jainhurkhabad, as they were tired, they sat near the field where she was raped by all the three appellants.**

(iii) **On seeing some persons from her village passing from there, all the three appellants fled from there and appellant Nanehey took away her clothes.**

(iv) **She wore another pair of clothes which she was carrying and started moving towards her village.**

(v) **Her brother Bhjagwan Dass happened to pass from there and she alongwith him, reached home.**

(vi) She informed her mother about the occurrence and thereafter he father brought her to Delhi.

(vii) After coming to Delhi, they went to the police station and narrated the entire incident.

Court statement (Examination-in-chief) recorded 01.07.2005

- (i) She was brought by the three appellants from her brother's house on the pretext that her mother was sick.
- (ii) **From Badarpur, they came to Railway Station by bus and by train upto Bareilly.**
- (iii) **From Bareilly, they started on foot for going to the village.**
- (iv) **On the way, all the three committed rape on her near the railway line which was at a short distance from her village.**
- (v) **Each appellant raped her twice one by one in the open near the railway line and thereafter, they all ran away leaving her at the spot.**
- (vi) **She reached her home in the village. On the next day, her father brought her to Delhi where complaint was lodged at the police station.**

Court Statement (Examination-in-chief) recorded on 19.07.2006

- (i) She was taken by the three appellants on 19.02.2004 at about 10.00 am from the house of her brother on the pretext of illness of her parents.
- (ii) **She was brought to Chaubari Railway Station which comes before Bareilly Station.**
- (iii) **They reached Chaubari Railway Station on the next day at about 4.00 am and from there, they proceeded on foot towards the**

village and on the way to the village at about 11.00 am, all the three appellants committed rape on her and thereafter they left her there and she reached home in Chaubari Village.

(iv) Her father brought her back to Delhi on the next day and then she was taken to the police station and report was lodged.

History givben by the prosecutrix and her father named Bhagirath to the doctor and recorded on the MLC Ex.PW2/A prepared on 25.02.2004

(i) **Taken by Nanehey, Raju and Ram Niwas on 19.02.2004 at 10.00 am by bus and then by train upto Bareilly and then on foot to Ram Ganga and then to Akha Gaon.**

(ii) **She was raped in a field on 20.02.2004 at 10.00 am by the three appellants.**

(iii) Her clothes were taken away and burnt.

(iv) **She was reunited to her parents by the villagers by 3.00 pm on the same day i.e. 20.02.2004.**

(v) On local examination : no sign of external injury; hymen admits two fingers, three slides taken and sealed and given to the police constable; no undergarment available; X-ray of knee, elbow and wrist for bone-age.

25. A bare perusal of the statement of PWs-1, 4, 5 & 10 recorded during investigation and then in the course of trial leads to the conclusion that the learned ASJ failed to take into consideration the inherent improbabilities in the prosecution case. The prosecution version was distorted right from the stage of registration of FIR till conclusion of

trial. Throughout, there was an attempt to suppress the truth recording concocted version at every stage. So much so that the prosecutrix, who was 19/20 years of age at the time of occurrence, was claimed to be 15 years old in the complaint Ex.PW-5/A i.e. a minor to make the offence appear more heinous. Not only that, despite directions by the Doctor to get ossification test conducted to ascertain her bony age, neither ossification test was got conducted nor any documentary evidence from the village like ration card, election identity card, extract of family register were collected to ascertain the age of the prosecutrix which was necessary to consider the defence plea of the appellant Ram Niwas that she was a consenting party.

26. On analysis of the statement made by these material witnesses, it is noticed that there are material discrepancies going to the root of the case to such an extent that the entire case of the prosecution has to be disbelieved not only on when the prosecutrix reached home but also that at the time when FIR was lodged in the case on 22.02.2004, the prosecutrix was already present in Delhi alongwith her father and brother. Here suffice it to mention that PW-5 Shyam Lal in his cross examination had stated as under :

'I went to PS on 22.02.2004 at about 3/4.00 PM alongwith 'R' and my father were also present on 22.02.2004 , My sister 'R' was with him in the police station when SI Ravi Shankar recorded my complaint Ex.PW5/A.'

27. Even the prosecutrix and her father have also stated that when the complaint was lodged before the police on 22.02.2004 by PW-5 Shyam Lal, they were present in the police station. This leads to the conclusion

that at the time of lodging report Ex.PW5/A on 22.02.2004, the prosecutrix was very much present in the police station but for reasons not known, the police registered only a case of kidnapping under Section 363 IPC. While prosecution witnesses i.e. PW-1 Bhagirath, PW-4 'R', PW-5 Shyam Lal and PW-10 Rajbala have deposed that prosecutrix reached home on 20.02.2004 itself, I fail to understand that how the case for kidnapping could have been registered when she was very much present with her father. It is worthwhile to note that the prosecutrix has reached home with history of repeatedly being raped by three grown-up persons in field. In her statement under Section 161 CrPC, the prosecutrix 'R' says that she became unconscious. However, the medical report does not support the case of prosecution. She has not suffered any internal or external injuries. If a teenager unmarried girl reached home after being sexually assaulted repeatedly within short interval by three persons, she was bound to have internal and external injuries requiring immediate medical attention. She has not been taken to any doctor in the Village.

28. The statement of PW-1 Bhagirath - father of the prosecutrix is to the effect that he had visited PS Bisarath Ganj when he could not find out the three appellants and prior to return of his daughter to the village. Prosecutrix has nowhere stated that after she reached home, she was taken by her father to the police station or that despite informing the local police about she being gang raped, they refused to register FIR. The material medical and scientific evidence could have been collected had she been taken to the hospital by her parents or the local police immediately.

29. In the impugned judgment, learned ASJ had returned the finding of guilt believing the testimony of prosecutrix and also observing that the forensic analysis of the undergarment of one of the accused has also tested positive for vaginal fluid as well as semen and that this piece of evidence is being viewed as corroborative. The learned ASJ failed to note that the vaginal fluid found on the undergarment of one of the accused was never opined to be that of the prosecutrix so as to connect him with this occurrence.

30. The material discrepancies and improvements in the testimony of PW-1 Bhagirath, PW-4 – ‘R’ – the prosecutrix, PW-5 Shyam Lal and PW-10 Rajbala on all vital aspects have already been highlighted and the only conclusion that can be discerned is that on 20.02.2004 not only the complainant but even his father knew that prosecutrix had returned home. It will be a futile exercise now to repeat as to where she has been raped, whether in open field or in an old constructed room or near railway track, how she reached home i.e. whether of her own or brought by her father from the field or by her cousin Bhagwan Dass from the field or by the villagers. On the one hand, it is coming on record in the testimony of PW-4 – the prosecutrix that on seeing the villagers, all the three appellants ran away leaving her there and she was brought home by the villagers, as per, PW-1 Bhagirath, he did not tell anyone about this occurrence. Taking into consideration the heinous nature of the crime being noticed by the villagers, on seeing whom the three appellants fled, the local police could not have refused to register a case and even if initially, there was some reluctance, had any such occurrence taken place in the village, the villagers would have ensured police action against

them for raping a teenager girl of the village.

31. It would be apposite to refer to decision of the Supreme Court reported as ***Rai Sandeep @ Deepu vs. State of NCT of Delhi 2012 (131) DRJ 3 (SC)*** wherein the quality of the testimony of the prosecutrix which can be made basis to convict the appellant, was considered in detail and it was so held :

'15. In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be

accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.'

32. In the case ***Abbas Ahmed Choudhury v. State of Assam (2010) 12 SCC 115***, the Hon'ble Supreme Court has held that :

'Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1.'

33. In another case ***Raju v. State of Madhya Pradesh (2008) 15 SCC 133***, the Hon'ble Supreme Court has held that testimony of the victim of a rape cannot be presumed to be a gospel truth and the relevant observations made by the Hon'ble Supreme Court are reproduced as under :

'11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily

such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.'

34. Reliance placed by learned APP for State on the report **Vijay @ Chinee vs. State of Madhya Pradesh** (Supra) that sole evidence of prosecutrix is sufficient to base the conviction does not call for any discussion for the reason that law on this aspect was dealt with in detail in paras 9 to 24 of the report **Vijay @ Chinee vs. State of Madhya Pradesh** and summarized as under :

'25. Thus, in view of the above, the law on the point can be summarized to be that the evidence of witnesses must be read as a whole and the cases are to be considered in totality of the circumstances and while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, should not be taken into consideration as they cannot form grounds to reject the evidence as a whole.'

35. When the testimony of the prosecutrix, her father and brother are tested on the anvil of principles laid down by the Apex Court in **Rai Sandeep's case** (Supra), in view of the material discrepancies and improvements almost on every point relevant for decision of the appeals, I am of the considered view that placing reliance on **Vijay @ Chinee vs. State of Madhya Pradesh** (Supra) by the State would be of no help for the reason that testimony of the material prosecution witnesses failed to meet the test on which their testimony is to be considered. The discrepancies in their statement are almost on all vital aspects which go to the root of the case.

36. The testimony of PW-1 Bhagirath, PW-4 – 'R' – the prosecutrix,

PW-5 Shyam Lal and PW-10 Rajbala is wholly unreliable and contrary to the FIR lodged and inconsistent to the statement made during investigation or subsequently before the Court. The whole prosecution version and investigation has been found to be only aimed at falsely implicating the three appellants. In a rape case, it is the duty of the prosecution to prove each ingredient of the offence and not for the accused to explain why they have falsely implicated. The testimony of PWs could not have been accepted by learned ASJ as gospel truth when so many infirmities and irregularities were surfacing as referred to above.

37. In this case, learned Trial Judge could have played a better role to ascertain the truth by going through the testimony of PW-1 Bhagirath, PW-4 'R' – the prosecutrix, PW-5 Shyam Lal – the complainant and PW-10 Rajbala minutely and looking for the corroboration through documentary evidence which unfortunately was not done in this case. The appellants have been convicted for a heinous offence of gang rape inviting minimum sentence of ten years, ignoring that prosecutrix was at her home in her village on 20.02.2004 before 4.00 pm to the knowledge of her brother PW-5 Shyam Lal and her father PW-1 Bhagirath. Despite that a false case under Section 363 IPC was got registered on 22.02.2004 at 7.30/7.35 pm against three persons naming them as kidnappers and praying for making search for the victim who even as per PW-1 Bhagirath, PW-4 – 'R' – the victim/prosecutrix and PW-5 Shyam Lal, was very much present at home on 20.02.2004 by 3.00/4.00 pm.

38. In the case *Shakila Abdul Gafar Khan v. Vasant Raghunath Dhoble (2003) 7 SCC 749*, it was observed that :

'The courts exist for doing justice to the persons who are affected. The trial/first appellate courts cannot get swayed by abstract technicalities and close their eyes to factors which need to be positively probed and noticed. The court is not merely to act as a tape recorder recording evidence, overlooking the object of trial i.e. to get at the truth, and oblivious to the active role to be played for which there is not only ample scope but sufficient powers conferred under the Code. It has a greater duty and responsibility i.e. to render justice in a case where the role of the prosecuting-agency itself is put in issue.'

39. In another case ***Zahira Habibullah Sheikh (5) v. State of Gujarat, (2006) 3 SCC 374***, it was observed that

'This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affects the whole community as a community and is harmful to society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interest of society is not to be treated completely with disdain and as persona non grata. The courts have always been considered to have an overriding duty to maintain public confidence in the administration of justice--often referred to as the duty to vindicate and uphold the "majesty of the law". Due administration of justice has always been viewed as a continuous process not confined to determination of the particular, case; protecting its ability to function as a court of law in the future as in the case before it. If a criminal court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. The courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in

relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the Judges as impartial and independent adjudicators.’

40. PW-1 Bhagirath, PW-4 – ‘R’ – the victim/prosecutrix and PW-5 Shyam Lal all have stated that at the time of registration of case on 22.02.2004, the prosecutrix was very much present in the PS alongwith her father. Strange enough that statement of PW-10 Rajbala, sister-in-law (*Bhabhi*) of the prosecutrix and wife of the complainant i.e. PW-5 Shyam Lal was recorded on 23.02.2004 and therein she stated that the life and honour of her *Nanad* was in danger and she be saved. This shows the falsity of the case of prosecution that the prosecutrix was with her family by 4.00 pm on 20.02.2004 but IO was just mechanically recording the statements of witnesses contrary to the fact that the prosecutrix was already with her family and visiting the police station.

41. In the case ***Mohd. Imran Khan vs. State Government (NCT of Delhi) (2011) 10 SCC 192***, the duty of Investigating Officer was described as under :

‘31. The investigation into a criminal offence must be free from all objectionable features or infirmities which may legitimately lead to a grievance to either of the parties that the investigation was unfair or had been carried out with an ulterior motive which had an adverse impact on the case of either of the parties. The investigating officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either of the party. He has to be fair and conscious so as to rule out any possibility of bias or impartial conduct so that any kind of suspicion to his conduct may be dispelled and the ethical conduct is absolutely essential for investigative professionalism. The investigating officer

“is not merely to bolster up a prosecution case with such

evidence as may enable the court to record a conviction but to bring out the reason unvarnished truth.”

(Vide Jamuna Chaudhary v. State of Bihar, (1974) 3 SCC 774 (p.780), State of Bihar vs. P.P.Sharma 1992 Supp (1) SCC 222 and Babubhai vs. State of Gujarat (2011) 13 SCC 705).’

42. It is a case where contradictory version are coming as to how the prosecutrix reached home after being sexually assaulted which have already been highlighted above. If the prosecutrix has gone of her own, then her condition at that time must have invited immediate medical attention even if due to honour of family being involved, her family did not want to make the issue public by reporting the matter to police. If she had been found in the field by her father, then also the situation remained the same, but, as stated by her, if she was brought home by the villagers, who had seen the offence being committed and the three appellants fleeing from the spot after seeing them, then the offence was already in the knowledge of villagers and matter could have been brought to the notice of police immediately for the reason that as per PW-1 Bhagirath, on coming to know that her daughter had been taken away by the three appellants from the house of her brother in Delhi on false pretext, he had visited the PS Bissat Ganj to report against the three appellants. When he had already brought the matter to the notice of PS Bissat Ganj (U.P.) about the alleged kidnapping of his daughter when she returned home either of her own or with her father, or villagers or Bhagwan Dass, whatever might be the situation, the police being already aware about the alleged kidnapping, the offence of rape being committed in the jurisdiction of that PS, immediate legal action could

have been taken, had the matter been brought to the notice of local police which has not been done in this case. Rather, he has come to Delhi to the house of his son i.e. PW-5 Shyam Lal – the complainant, alongwith the prosecutrix and thereafter also, the report lodged is that of kidnapping and not of gang rape.

43. The manner in which prosecution claims to have arrested appellants Raju and Nanehey from Badarpur Border is also under cloud and put a question mark on the fairness of the investigation throughout. On the point of arrest of Raju and Nanhe, PW-5 Shyam Lal had denied that Raju and Nanehey were arrested on 25.02.2004. Rather stated that on 23.02.2004 accused Raju and Nanehey were arrested from Village and brought to Delhi by the police in the evening at about 7.00 pm.

44. None of the material prosecution witnesses i.e. PW-1 Bhagirath, PW-4 – ‘R’ – the prosecutrix, PW-5 Shyam Lal and PW-10 Rajbala have stated about any information with them that the appellants were present in Delhi. Rather they are specific that Raju and Nanehey were brought from the village by Delhi Police.

45. Arrest memo Ex.PW5/D and E of Nanehey and Raju show that column No.5 where place of arrest was to be mentioned, while this column is blank in the case of Nanehey, in the case of Raju, only ‘B’ is written. No time of arrest is given in Column No.6 and only date is given as 25.02.2004. In the personal search memo Ex.PW5/B and C of Raju and Nanehey, personal search has been shown as ‘NIL’. Both these appellants are from District Bareilly, U.P. and if they had been arrested in the manner cited by the IO, at least some journey ticket, paper and money to meet their daily and travelling expenses, would have been

recovered from their possession in their personal search which is not so. There is no departure entry placed alongwith the chargesheet by the IO to show that the police party alongwith PW-5 Shyam Lal left for Badarpur Border to apprehend the offenders or any arrival entry after their arrest in this case. Unfortunately the publication in Amar Ujala or Dainik Jagran and affidavit given by Pradhan of the village and local politician regarding their taking away from the village by Delhi police on the pretext of making inquiries, could not be proved by them in their defence, but at the same time, that does not absolve the prosecution of its responsibilities to prove the date, time and place of arrest of the appellants in this case. A bare perusal of the arrest memos and personal search memos of these appellants when read alongwith the testimony of material prosecution witnesses especially PW-5 Shyam Lal – the complainant, falsify the case of prosecution that Nanehey and Raju were arrested from Badarpur Border, Delhi.

46. In view of the aforesaid, I am of the considered view that entire prosecution story has been concocted for the reasons best known to the prosecution. The conclusion arrived at by learned Trial Judge is wholly perverse in view of the incredible testimony of PW-1 Bhagirath, PW-4 – ‘R’ – the prosecutrix, PW-5 Shyam Lal – the complainant and PW-10 Rajbala, *Bhabhi* of the prosecutrix and other inherent defects noticed in prosecution evidence. The appeals are allowed. The impugned judgment passed by learned Trial Court is set aside. The appellants Raju, Nanehey and Ram Niwas are acquitted of the charge under Section 366 and 376(2)(g) IPC.

47. As per the nominal roll received, appellants Raju and Nanehey have undergone eight years, eight months and twenty-one days in judicial custody in this case as on 18.11.2012, out of the total sentence of ten years awarded to them and they have earned remission of one year, two months and twenty seven days. As per the report received from Jail Superintendent, appellant Ram Niwas was released on bail in this case on 29.10.2011.

48. Appellants Raju and Nanehey be released forthwith, if not required in any other case.

49. LCR be sent back along with copy of the order.

50. Copy of this order be sent to the Jail Superintendent.

PRATIBHA RANI, J

November 20, 2012

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